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In The

Supreme Court of the United States

OCTOBER TERM, 1966

1250

AMERICAN GUILD OF VARIETY ARTISTS,
Petitioner,

vs.

WILLIAM SMITH, doing business as SMITH ENTERTAINMENT AGENCY and as SMITH & DALE CIRCUS,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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SUMMARY STATEMENT OF FACTS

Respondent, William Smith, 58, started in the carnival business at 14 and continued to 1956. In 1957 he began producing shows for county fairs using circus acts. His shows increased in size until 1961. In 1961 he began booking larger and better fairs for 1962. His efforts culminated in contracts with 17 of the fair boards of the larger fairs in the five states of Minnesota, Wisconsin, Iowa, South Dakota and Michigan, beginning on July 28, 1962, at Faribault, Minnesota, and playing almost continuously (less travel time) and ending September 1, 1962, at Onekama, Michigan. For this run of shows Mr. Smith engaged A.G.V.A. Union performers on Union contracts. Prior to this run he had taken a circus for a tour of Canada and Alaska. Smith left the show at Edson, Canada, claiming one of the performers, Stebbing, had stolen the show (T. 329-332). When he left he owed the performers

approximately $9,000.00 (T. 303). Most of the performers in the Canadian tour were also on separate contracts to perform on the summer tour commencing at Faribault.

On July 17, 1962, a meeting was held by the A.G.V.A. executive committee. No notice of the meeting was given Smith. At the meeting it was recommended Smith be placed on the unfair list (T. 1014; 1020). Herb Meyers, Minneapolis Branch Manager, sent Mr. Smith a telegram July 20, 1962, notifying him he was on the unfair list for nonpayment of salaries due its members (T. 49). Meyers did not have authority to place a producer (Smith) on the unfair list (T. 1021). This had to come from the national headquarters of A.G.V.A. A letter to this effect was not sent by national headquarters until July 30, 1962, after the Faribault fair (T. 1021).

In the meantime, on July 20, 1962, Mr. Meyers contacted the treasurer and secretary of the Faribault fair board by phone and ordered them to cancel Smith's contract and, when they protested they had a contract with Smith, were told it was void. To their protests that they had to have a show, he told them "they" would take over the contract and put on the same show (T. 445-447; 511-512).

At a meeting with the fair board arranged for the following Monday by Mr. Meyers, he (Meyers) again demanded the fair board cancel its contract with Smith. When members of the fair board protested that they had no grounds to cancel Smith's contract they were told it was void. To prove this point, Meyers placed a phone call to the national office in New York, allowing a member of the fair board to listen while he obtained from the Midwest Regional Director a "legal opinion" that the fair board could cancel its contract with Smith (T. 518). He (Meyers) further told the fair board Smith was gone and his whereabouts unknown and that he could not and would not produce a show and said,

"We're going to take over the contract" (T. 450), and negotiated for the contract, demanding a guaranty. Smith later appeared at this meeting.

At another meeting Monday night at which the fair board informed Meyers that it had been decided to honor Smith's contract, Mr. Meyers said, "You leave me no alternative but to picket your fair" (T. 456), and Meyers agreed this was his intent (T. 1041).

Meyers then sent telegrams to the other 16 fair boards informing them Smith was on the unfair list and contacted at least nine secretaries of the fair boards by phone (T. 748).

Many of the Union performers came to Faribault to work for Smith (T. 342; 412; 1099). Picketing was begun Thursday morning, July 26, 1962, and continued to 10:00 or 11:00 P.M. that night, picketing a thrill show of no connection with Smith (T. 459). They also picketed Friday during other shows having no connection with Smith. On Saturday they picketed in the morning and afternoon. Saturday afternoon the Smith show played and immediately afterward his contract was cancelled and he left the grounds.

After cancellation of Smith's contract the Union again tried to take over his contract. The fair board refused (T. 530; 552; 469). The Union had promised the pickets they would take over Smith's contracts and, if the performers wanted to work, they should stick with the Union (T. 1101).

Many times during the week of the fair, Meyers and Stebbing approached fair board members about putting on the show in Smith's stead (T. 524; 526). The pickets carried misleading signs (T. 546).

Although Smith's show had been cancelled and he had left, the pickets continued Saturday night and Sunday. On Saturday night several of the members of Smith's troupe, who wished to go home, were so frightened by threats from pickets that they remained in the grandstand until 2:00 A.M.

Sunday morning (T. 759; 570; 574; 582; 765). During the fair, other performers were threatened: helicopter pilot John Clark (T. 633; 655), trapeze girl Yvonne Stevens (T. 720; 743). The secretary of the Faribault fair board and mayor of Faribault, Frank Duncan, was also threatened. Mr. Duncan asked for police protection (T. 531). Other threats were made and the fair board took special precautions (T. 531; 588).

Smith's remaining performers quit when the Faribault contract was cancelled. Thereafter many of these acts played fairs with whom Smith had contracts (T. 621; 591; 593).

Thereafter, with the exception of two weeks, respondent Smith was without employment up to the time of trial (T. 92).

ARGUMENT

SECTION 6 OF THE NORRIS-LaGUARDIA ACT NOT TO BE CONSIDERED AT THIS TIME

Since this defense has not been heretofore raised, can the appellate court consider this issue at this time?

This issue cannot be raised at this time. According to the general rule, issues not raised in the trial court may not be raised in the appellate courts.

Sisco v. McNutt, et al., 209 F.2d 550, was a case in which plaintiffs had sued defendant Sisco, a labor union officer, for injuries received as a result of an alleged conspiracy between plaintiffs' assailants and Sisco. Sisco for the first time raised the issue of 29 *U.S.C.A.* 106 (Sec. 6 of the Norris-LaGuardia Act) on appeal. This Court said:

> "The question of the applicability of Section 6 of the Norris-LaGuardia Act to this case was never raised or even mentioned in the District Court at any time. Assuming the pertinence of the section to this case, which concededly had its roots in a labor dispute and involved

the liability of Sisco, an officer of a labor union, to the plaintiffs for injuries actually inflicted by Sisco's associates, who were members of the union, the section did not deprive the District Court of jurisdiction to try this action. Section 6 is either a rule of evidence or one changing the substantive law of agency. *United Brotherhood of Carpenters and Joiners of America v. United States,* 330 U.S. 395, 403, 67 S.Ct. 775, 91 L.Ed. 973.

"This Court is a court of review and not a court for the retrial of cases. It is only in exceptional cases that questions of law not presented to or passed upon by the trial court will be reviewed. *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996, and cases cited; *Trapp v. Metropolitan Life Ins. Co.* (8 Cir.), 70 F.2d 976, 981; *Helvering v. Hormel* (8 Cir.), 111 F.2d 1, 5, affirmed 312 U.S. 552, 61 S.Ct. 719, 85 L.Ed. 1037. The general and almost invariable rule is that questions not called to the attention of or ruled upon by a trial court will not be reviewed on appeal. *Goldie v. Cox* (8 Cir.), 130 F.2d 695, 715; *Zuckerman v. McCulley* (8 Cir.), 170 F.2d 1015, 1018; *Hoyt v. Clancey* (8 Cir.), 180 F.2d 152, 154. It is safe to say that this rule should be adhered to except 'where the obvious result would be a plain miscarriage of justice.' *Hormel v. Helvering,* 312 U.S. 552, 558, 61 S.Ct. 719, 772, 85 L.Ed. 1037. The application of the rule in this case will not produce a plain miscarriage of justice. A departure from the rule would not be justified. The defendant had his full day in court. Having made no objections to the legal theory upon which the issue of his liability was submitted to the jury, either by asking for instructions or taking exceptions to the instructions given, he is in no position to assert that the District Court comitted prejudicial error in not submitting the case upon a different theory."

Other cases following this general rule are as follows:

Defenses in avoidance of a claim made in a declaration must be proved in a court of original jurisdiction and if not proved there, they cannot be successfully set up in the appellate court to support an assignment of error.

Merchants' Mutual Ins. Co. v. Baring Bros. & Co., 87 U.S. 157, 20 Wall. 159.

Plaintiffs in error could not complain that the Circuit Court did not give effect to a defense which they did not think it worthwhile to plead.

Potter v. U. S., 1 S.Ct. 524, 107 U.S. 126 (1882, Minn.).

Issues or questions not raised in or presented to trial court will not be considered in reviewing court.

DeWolf v. Raband, 26 S.Ct. 475, 201 U.S. 371 (1906).

Becker Co. v. Cummings, 36 S.Ct. 15, 296 U.S. 74 (1935).

Ground of defense not urged in trial court may not be urged on appeal.

U. S. v. LeBaron, 60 U.S. 73, 19 How. 73 (1856).

The Supreme Court will not undertake to review what the Court below did not decide.

Walters v. City of St. Louis, Missouri, 74 S.Ct. 505, 347 U.S. 231.

A point raised for the first time before the Supreme Court would not be considered.

Woods v. Lawrence County, 66 S.Ct. 393, 326 U.S. 638.

See also:

Sliver v. Shelback (1786), 1 U.S. 165, 1 L.Ed. 84.

Houghton v. Jones (1863), 68 U.S. 702, 1 Wall. 707.

Chicago & E. I. R. Co. v. Southern Ry. Co. (C.A. Ind. 1959), 261 F.2d 394.

Stanley v. U. S. (6 Cir. 1957), 245 F.2d 427.

Topey v. Red Owl Stores (8 Cir. 1955), 228 F.2d 117.

As pointed out by the Circuit Court in its decision in the instant case, the A.G.V.A., as a matter of trial strategy,

avoided the Section 6 issue. Are they now to be heard to claim prejudice because of their own omission?

APPLICABILITY OF DEFENSE OF 29 U.S.C. §106 TO FACTS OF THIS CASE

The overwhelming authority heretofore cited shows the defense of 29 *U.S.C.* §106 is not applicable to the facts of this case. It should be further pointed out that two jury verdicts in this case have held that the appellees were not involved in a bona fide labor dispute but were, in effect, attempting to appropriate appellant's contracts and put him out of business. The Union had no lawful objective. Since the Union had no lawful objective it is not entitled to rely upon a federal act passed for the protection of those involved in bona fide labor disputes. The Union should not be allowed to use the Norris-LaGuardia Act as a weapon to accomplish an illegal purpose. There was no "labor dispute" within the meaning of the Norris-LaGuardia Act as the Union activity was not intended to bring about a legitimate Union goal. The testimony was so strong on this point that it is beyond dispute. See Transcript, pages 451, 518, 519, 339, 524, 526, 530, 552, 511, 515, 707.

The facts show that Herb Meyers, the Regional Agent, was responsible for most of the acts or illegal activities of the Union. He communicated with the national office in New York by telephone and, while a fair board member was listening, asked the Midwest Regional Director whether the fair board had a right to cancel Smith's contract. The Midwest Regional Director informed Meyers and the fair board member that Smith's contract was not valid and they could break it (see Transcript, pages 454, 517, 1037).

Herb Meyers also contacted the national office by phone and obtained authority to put plaintiff on the unfair list (see Transcript, page 964).

The national Union also later placed the Faribault fair board on the unfair list (Transcript, page 542).

According to appellant Union's witnesses' testimony, the national board of the Union or its national executive committee are the only groups authorized to place someone on the unfair list (Transcript, page 937). Herb Meyers testified that "The national office told me that under no circumstances would they allow this fair to go on under Smith's jurisdiction" (Transcript, page 978). Stebbing, one of the Union actors and pickets, said, "Anything serious, we always telephoned the New York office" (Transcript, page 848).

VIOLENCE AND THREATS OF VIOLENCE

There is no doubt that Section 8(b)(1) is not the exclusive method of controlling threats, coercion, and violence against employees by labor unions as pointed out by the Circuit Court in its decision of August 9, 1965 (349 F.2d 975), in the instant case. This is further substantiated by the *Gibbs* case:

> "This Court has consistently recognized the right of States to deal with violence and threats of violence appearing in labor disputes, sustaining a variety of remedial measures against the contention that state law was pre-empted by passage of federal labor legislation." (Citing cases.) *U.M.W. v. Gibbs,* 86 S.Ct. 1130, 1140.

The Circuit Court in its first decision in the instant case (349 F.2d 975) set out in some detail the threats and coercion by Meyers and other pickets and the effect that this had on the fair board, the circus and Smith and the relations of Smith with the fair board and his performers.

Petitioner in its brief describes the Union activities as peaceful, although these activities caused the Mayor of Faribault to obtain additional police protection for the fair generally (T. 531) and himself, particularly (T. 531, 550), when he received a threat to his life, and caused several performers to remain in the grandstand for several hours Saturday night

until 2:00 A.M. Sunday morning, afraid to leave while the threatening pickets remained (T. 563, 570, 574, 582, 759, 765). These "peaceful" activities further caused several performers, union and non-union, who went to Faribault to work for Smith, to leave without working. The helicopter pilot, John Clark, said he was frightened by Meyers (T. 654). That Meyers told him that he "was not going to haul the trapeze act and that he had some people that would see to it that I would not haul it" (T. 655).

The whole atmosphere at Faribault during the fair was one of fear and tension and there were threats of bus loads of people coming in to "take care of the situation." The Civil Defense Police Force was alerted as well as the regular Faribault police (T. 531).

The *Gibbs* case was characterized by one day of violence followed by months of peaceful picketing, while in the instant case tension and threats of violence were mounting. As pointed out by Faribault's Mayor Duncan, the fair board was of the opinion that Sunday (the final day of the fair) was the day they expected an eruption of violence (T. 531-32).

As the Circuit Court said in its first opinion in the instant case after citing numerous instances of threats:

> "The evidence here would support a finding that the union's activities went well beyond peaceful primary picketing. There is substantial evidence of threats of physical harm made by Meyers and other pickets to non-union employees and fair officials which placed them in fear for their safety. When Smith's union employees went on strike, he employed non-union actors to put on the show. There is substantial evidence from which the jury could find that the defendant threatened and coerced such non-union actors with the result that some refused to perform and the performance of others was impaired. An inference could be drawn that the sub-standard performance could be attributed to threats made by the pickets. Moreover, the Secretary of the fair testified that Meyers told him the dog man was pretty

mad and that 'he would hate to be in my shoes because I might not be living tomorrow.'

"The fair board found it to be necessary to arrange for additional police protection." *Smith v. A.G.V.A.* (C.A. 8, 1965), 349 F.2d 975, at page 983.

The Circuit Court then also pointed out that this plaintiff presented evidence that the inferior performance and difficulty at Faribault caused cancellation of the sixteen other contracts and that even Judge Larson (the trial judge), in his opinion, said: "If there was liability for defendant's actions in Faribault, we fail to see how liability could end there." This issue was presented to the jury and the jury found for plaintiff.

UNION OBJECTIVES UNLAWFUL

Instruction 5, given by Judge Larson, deals with the crux of the union activity. This instruction reads as follows:

"5. Placing the plaintiff on an unfair list, notifying the various Fair Boards of this fact, and picketing are justifiable interferences, and if you find that the purpose motivating these actions by the defendant was the furtherance of its own interest in protecting its members, you should find for the defendant. To find for the plaintiff's motives were more than a furthering of its interest as a labor union, and that it intended without just cause to harm the plaintiff by destroying his business or appropriating his contracts."

For the jury to render a verdict for the plaintiff under this instruction the jury had to find either that the Union actually intended and its actual purpose in its activities was to put plaintiff out of business or to actually enter the entertainment business and take over his contracts to play the various fair boards. Yet, the verdict for the plaintiff confirms that defendant Union was actually guilty of such illegal and bizarre activity.

The courts have long held that a Union cannot claim a right to picket even peacefully, under the First Amendment, where the Union has an unlawful objective. See *Burke v. Downey* (1960), 197 N.Y. Supp.2d 89, 22 Misc.2d 911; *U. S. v. Petrillo* (D.C. Ill., 1946), 68 F.Supp. 845, reversed on other grounds, 67 S.Ct. 1538, 332 U.S. 1, 91 L.Ed. 1877; *Print. Spec. Loc. 388 A.F.L. v. LeBaron* (C.A. Calif. 1949), 171 F.2d 331, Cert. Den. 69 S.Ct. 884, 336 U.S. 953; *N.L.R.B. v. Perfect Circle Co.* (C.C.A. 7, 1946), 162 F.2d 566.

Not all concerted activities may be labeled as protected by Sec. 7 of the Act, but only those activities which are legal or lawful in the first instance. *N.L.R.B. v. Dallas Gen'l Drivers, etc., Loc. 745* (5 Cir.), 264 F.2d 642, 646; *Coop. Ref. Assn. v. Williams* (1959), 345 P.2d 709.

There is little doubt that the instant case also affords respondent protection from the alleged defense of peaceful picketing.

It is also well settled that an activity not protected by Sec. 7 or prohibited by Sec. 8, that is not arguably subject to Sec. 7 or Sec. 8 of the Act, and which does not operate to frustrate the purpose of the Act, is a valid state issue, triable in state or federal courts. *Ex Parte George,* 358 S.W.2d 590; *Local 20 Teamsters v. Morton,* 377 U.S. 252, 12 L.Ed.2d 280, 84 S.Ct. 1253.

CONCLUSION

The only question for consideration by this Court is whether the judgment by the Circuit Court is inconsistent with this Court's opinion in the *Gibbs* case, and, if it is not, there is no reason to disturb the judgment. *Steinfeld, et al., v. Zeckendorf, et al.*, 36 S.Ct. 14, 239 U.S. 26.

We submit that the Circuit Court has re-examined its prior decision in light of the *Gibbs* case and found its decision consistent. This judgment should not be disturbed.

We therefore submit the petition should be denied.

Respectfully submitted,

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